



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 19-01543
)
Applicant for Security Clearance)

Appearances

For Government: Erin Thompson, Esq., Department Counsel
For Applicant: *Pro se*

11/07/2019

Decision

BENSON, Pamela, C., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline H (Drug Involvement and Substance Misuse), and Guideline E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on January 17, 2016. On June 26, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline H and Guideline E. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective on June 8, 2017.

Applicant answered the SOR on July 19, 2019, and requested a hearing before an administrative judge (Answer). The case was assigned to me on August 8, 2019.

The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on August 29, 2019, setting the hearing for September 17, 2019. The hearing was held as scheduled.

During the hearing, Department Counsel offered Government Exhibits (GE) 1 and 2; Applicant testified, but did not offer any documents. I admitted all proffered exhibits into evidence without objection. DOHA received the hearing transcript (Tr.) on September 30, 2019, and the record closed.

Findings of Fact

Applicant admitted all of the allegations in his Answer to the SOR. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 24 years old. He has never married and has no children. He earned a bachelor's degree in May 2018. He has been employed by his present employer, a federal contractor, since June 2018. His job title is software developer. Applicant was granted an interim DOD security clearance on October 24, 2018, however, his security clearance was discontinued after the SOR was issued in June 2019. (Tr. 7, 13-14; GE 1)

In his October 2018 SCA, Applicant disclosed that he had previously used marijuana on three occasions during college. Between November 2016 and April 2017, he consumed THC-infused cakes twice, and smoked marijuana once. He listed that his experiences (of using THC) were rather "underwhelming, especially when considering the risks of using it." Applicant admitted that his use of marijuana usually coincided with drinking alcohol. He also acknowledged that marijuana use is illegal under Federal law and illegal in the state in which he resides. (Tr. 14-16, 22; GE 1)

From December 2018 through January 2019, Applicant traveled to Europe with his girlfriend. Before he departed for his trip, he had received an e-mail notifying him that he had been granted an interim DOD security clearance. Applicant admitted receiving this notice, but stated he was uncertain of the underlying implications and responsibilities of being granted an interim security clearance. He did not seek before his trip. In January 2019, Applicant and his girlfriend visited the city of Amsterdam where the use of marijuana is legal. They visited a coffee shop and purchased two marijuana joints and two THC infused pastries, known as "space cakes." They consumed all of their purchases during the course of one evening. Applicant admitted this was the first time he felt the effects of the THC, and he considered it disorienting. (Tr. 17-22)

Since his visit to Amsterdam in January 2019, Applicant has not used marijuana, and he stated at the hearing that he is willing to sign a letter of intent not to use marijuana in the future. Applicant's supervisor is fully aware of Applicant's past use of marijuana. His girlfriend has not used marijuana since their trip to Amsterdam. He

knows of friends that occasionally use marijuana, but he does not socialize with them when they are using it. Applicant admitted that he experiences periods of anxiety, but he has never used marijuana to treat his anxiety. He denied having any problems with marijuana, and he does not need any type of substance abuse treatment. Applicant stated that he has been completely honest and forthright by disclosing his use of marijuana during the course of his DOD investigation. (Tr. 22-25)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable security decision."

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H: Drug Involvement and Substance Misuse

The security concern relating to the guideline for drug involvement and substance misuse is set out in AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual’s reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations.

AG ¶ 25 provides conditions that could raise security concerns. The following are potentially applicable:

- (a) any substance misuse; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

Applicant used marijuana at college a few times between November 2016 and April 2017. He also used marijuana while visiting Amsterdam in January 2019, while he held an interim DOD security clearance. The above disqualifying conditions apply.

The guideline also includes conditions that could mitigate security concerns raised under Drug Involvement and Substance Abuse. The following mitigating conditions under AG ¶ 26 are potentially applicable:

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment; and
- (b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions to overcome the problem, and has established a pattern of abstinence, including, but not limited to:

- (1) disassociation from drug-using associates and contacts;
- (2) changing or avoiding the environment where drugs were being used; and
- (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Applicant's last use of marijuana was less than a year ago. He was aware that marijuana use was incompatible with the holding of a DOD security clearance. He filled out his October 2018 SCA and was granted an interim security clearance that same month. Applicant used marijuana less than three months later. He failed to abstain despite acknowledging the potential work and personal costs that further marijuana use could have on his life. Although Applicant provided some mitigation indicating he is now abstaining from marijuana use, has changed his environment, and has disassociated from those who use marijuana, those actions are insufficient to overcome his past conduct and his recent failure to abstain from marijuana use after being granted a DOD security clearance. The record evidence leaves me with serious questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline H, drug involvement and substance misuse. AG ¶ 26(a) and (b) do not apply.

Guideline E: Personal Conduct

AG ¶ 15 expresses the security concern for personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. . . .

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of: . . .

(3) a pattern of dishonesty or rule violations; and

(e) personal conduct ...that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing, and

(3) while in another country, engaging in any activity that, while legal there, is illegal in the United States.

Guideline H allegations ¶¶ 1.a and 1.b are cross-alleged under Guideline E ¶ 2.a. Each of them is established by the record evidence. AG ¶¶ 16(c), 16(d)(3), and 16(e)(1) and (2) apply.

AG ¶ 17 sets forth potentially applicable mitigating conditions under Guideline E:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant used marijuana less than a year ago, and after he had been granted an interim DOD security clearance. He acknowledged his misconduct and is remorseful. I find that Applicant is intelligent, candid, and unlikely to use marijuana in the future, but his behavior is too recent to overcome the personal conduct security concerns. His decision to use marijuana after being granted an interim security clearance raises serious concerns about his judgment. AG ¶¶ 17(c) and 17(d) do not apply.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment.

Applicant's last use of marijuana in 2019 is recent. The Directive does not define "recent," and there is no "bright-line" definition of what constitutes "recent" conduct. ISCR Case No. 03-02374 at 4 (App. Bd. Jan. 26, 2006). The Judge is required to evaluate the record evidence as a whole and reach a reasonable conclusion as to the recency of an applicant's conduct. ISCR Case No. 03- 02374 at 4 (App. Bd. Jan. 26, 2006).

Applicant's use of marijuana while holding a security clearance places a heavy burden on him to establish mitigation. After considering the record as a whole, to include the circumstances surrounding Applicant's limited use of marijuana, and Applicant's remorse for his actions, I conclude that Applicant has not met his heavy burden of proof and persuasion due to the recency of his last use of marijuana and that he used marijuana while holding a DOD security clearance. The evidence persuades me that he has not yet matured sufficiently to comport his behavior with applicable laws and regulations in general. More time is needed to demonstrate that he is fully capable of independently monitoring his behavior and to show that he is fully dependable. Overall, his recent conduct does cast doubt on his reliability, trustworthiness, and good judgment. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline H and Guideline E.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a-1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Pamela C. Benson
Administrative Judge